Seattle Fire Department

SAFETY AND HEALTH

Order on agreement of parties

The Board has final authority to enter an order on agreement of parties or decline to do so and an interlocutory appeal will not rise from the industrial appeals judge's statement advising the parties of the Board's willingness to allow particular language in the order. Where the written stipulation included a statement that the employer specifically denied that it violated WISHA, the Board will decline to enter the order on the basis the parties' agreement is not supported by the facts and the law. ***….In re Seattle Fire Department,* BIIA Dec., 92 W241 (1993)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SEATTLE FIRE DEPARTMENT	**)**	**DOCKET NO. 92 W241**
	)	
	)	**ORDER DECLINING TO ENTER ORDER ON**
CITATION & NOTICE NO. 115509416	**)**	**AGREEMENT OF PARTIES**

APPEARANCES:

Employer, Seattle Fire Department, by
Claude Harris, Chief, and
Seattle City Attorney, per
Helaine Honig, Assistant

Employees of Seattle Fire Department, by
Seattle Fire Fighter Union, Local 27, per
Tony Vivenzio and Jim Fossos

Department of Labor and Industries, by
Office of the Attorney General, per
Aaron Owada, Assistant

This is an appeal filed by the employer, Seattle Fire Department, on September 16, 1992 with the Safety Division of the Department of Labor and Industries and transmitted to this Board on September 29, 1992. The employer appealed Citation and Notice No. 115509416 issued by the Department of Labor and Industries on August 25, 1992. The Citation and Notice alleged that the Seattle Fire Department had committed four serious violations of regulations promulgated under the authority of the Washington Industrial Safety and Health Act [hereafter "WISHA"]. The Citation and Notice assessed penalties in the sum of $2,430.00 and set an abatement date of September 27, 1992 for all violations.

This matter is before the Board pursuant to the parties' Interlocutory Appeal of a ruling made by our Industrial Appeals Judge. The parties submitted a written request that we enter an Order on Agreement of Parties in accordance with the written Agreement of Parties. The Agreement of Parties has been signed by all interested parties. The Industrial Appeals Judge assigned to this appeal had advised the parties, in writing, that this Board does not allow "exculpatory language" in the form of a nonadmissions clause to be included in agreements which form the basis of our final decision and order. The Chief Industrial Appeals Judge, on August 30, 1993, declined the request for interlocutory review. He appropriately forwarded the written agreement to this Board for its consideration of whether a final decision and order should be entered in accord with that written agreement.

The statement, regarding nonadmissions clauses, included in the Industrial Appeals Judge's letter of August 10, 1993 is accurate, but we believe it should be clarified. It appears that the Industrial Appeals Judge orally advised the parties that the Board would not "issue an order on agreement of parties" and that the matter would be referred to the hearings process. Interlocutory Appeal and Affidavit at 2. In fact, the Industrial Appeals Judge should have submitted the written agreement to this Board for its review and consideration. An Order on Agreement of Parties is a final decision and order of the Board. It is not signed by an Industrial Appeals Judge. When parties to an appeal seek an Order on Agreement of Parties, only the Board has final authority to enter such an order or decline to do so, as we do in this appeal. Our authority to enter final orders is imposed by the Legislature. We will enter orders based on the parties' agreement, so long as we find the agreement "is in conformity with the law and the facts." RCW 51.52.095(1).[1] As a result, we have reviewed the written agreement to determine if it is in conformity with both the law and the facts as presented to us.

The written stipulation proposed as the basis for this Board's Order on Agreement of Parties includes the following provision:

> The parties agree that there exists a serious and bona fide dispute as to the above-listed violation and the facts relied on by the Department in its support. The Seattle Fire Department specifically denies any claim that it acted in violation of WAC 296-62-3112 or any other law or regulation. . . . [T]he payment of the penalty and the signing of this agreement are not an admission by the Seattle Fire Department of any violation of the Washington Industrial Safety and Health Act, nor is it an admission of the allegations or conclusions set forth in the Citation. However, nothing shall limit the Department's ability to use the affirmation of the violations contained in this Agreement of Parties in future proceedings brought under Chapter 49.17 RCW.

Agreement of Parties at 3-4. (Emphasis added).

After a thorough review of the written agreement and the assertions set forth in the interlocutory appeal, we conclude that it is fundamentally inconsistent to assert a lack of wrongdoing while acquiescing to an affirmance of the Citation and Notice. If the employer does not admit the violations occurred or that there exists sufficient evidence to support a finding that the violations occurred, we

[1]This is consistent with the directive of RCW 49.17.140(3) that the Board shall "make disposition of the issues in accordance with procedures relative to contested cases appealed to the state board of industrial insurance appeals."

cannot affirm the Citation and Notice based upon a factual showing (by means of a non-admissions clause) that the violations may not have occurred.

The Department has repeatedly asserted that nonadmissions clauses, or exculpatory language, may appropriately be included in Board orders. In re General Plastics Manufacturing Company, Dckt. No. 92 W018 (1993). In making the argument, the Department relies on decisions entered by the OSHA Review Commission. See e.g., Farmers Export Company, 8 OSHC 1655 (1980). As we have noted in other appeals, the legislature included several variations in WISHA which do not appear in the federal OSHA. Those "variations from the federal scheme are, in our view, significant." In re Ledcor Industries, Dckt. No. 91 W058 (June 5, 1992).

As we stated in Ledcor:

> [T]he better view of legislative intent is that we would handle the settlement of contested WISHA cases just as we would handle the settlement of any other type of contested case within our jurisdiction.

Id. at 9.

The Agreement of Parties proposed in this appeal is supportive of the underlying purposes of WISHA in that it is clearly designed to enhance workplace safety. For that reason, we are initially inclined to enter the Order on Agreement of Parties. Inclusion of the exculpatory language, however, renders the agreement inconsistent with the facts. In light of the Legislature's directive that our Orders on Agreement of Parties be in conformity with both the law and the facts, we must decline to enter the Order on Agreement of Parties based on an agreement that clearly tries to achieve an inconsistent result by both denying the occurrence of actions in violation of WISHA and affirming the Citation and Notice.

This Board is committed to the purposes of WISHA and is more than willing to enter agreed orders so long as they conform to the law and the facts! We recognize that the parties have attempted to resolve this appeal in a manner which best promotes workplace safety. Unfortunately, the inclusion of the nonadmissions clause effectively negates the noteworthy purposes of the written agreement.

We hold that no Order on Agreement of Parties can or will be entered by this Board unless it conforms with the law and the facts. In so holding, we encourage the parties to explore all the mechanisms available for resolving their dispute. The remedies available before this Board include orders: affirming the Citation and Notice; modifying the terms of the citation and then affirming the Citation and Notice as modified; vacating the Citation and Notice; and remanding the matter to the

Department. If the matter is remanded to the Department, the Department then may exercise its responsibility to administer WISHA in accordance with the legislature's directives.

Accordingly, the request to enter an Order on Agreement of Parties based on the Agreement of Parties received by the Board on August 26, 1993, is denied. This matter is referred to the mediation/hearing process for the scheduling of further proceedings. WAC 263-12-093(2).

It is so ORDERED.

Dated this 1st day of September, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
ROBERT L. McCALLISTER Member